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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1387

In re the Marriage of

JAMES E. FITHIAN, JR.,

Petitioner,

and

CAMILLE J. FITHIAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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JAMES E. FITHIAN, JR.,

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and

CAMILLE J. FITHIAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of California entered herein on January 3, 1974, affirming the decision of the Court of Appeal, Fourth District, State of California and the Judgment of the Superior Court of the State of California for the County of Orange.

Opinion Below.

The opinion of the Supreme Court, State of California is reported at 10 Cal.3d 592; .... P.2d ....; it is printed in Appendix A at page 1a, *infra*. The opinion was delivered and filed January 3, 1974.

Jurisdiction.

The opinion of the California Supreme Court was made and entered on January 3, 1974. This petition

was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Was it the intent of Congress that in enacting the Federal Military Retirement System that petitioner's retirement benefits be his sole and personal entitlement not subject to division under the community property laws of the State of California, or any other State law that arbitrarily deprives the retiree of a portion of his retirement pay?

2. Has the United States preempted the field of characterization of federal military retirement benefits by virtue of its exclusive legislative jurisdiction, thus precluding the State of California from judicially divesting Petitioner of all or a portion of his retirement benefits?

3. In light of the fact that federal courts have clearly distinguished between federal pensions and federal military retirement and has characterized military retirement as a continuation of active duty on a reduced basis, does this characterization preclude the California courts from characterizing such military retirement pay solely as compensation for past services in order that said courts might find sufficient jurisdictional basis to order an equal division of said retirement pursuant to its community property laws?

Constitutional and Statutory Provisions Involved.

Appellant was retired pursuant to 10 U.S.C.A. 6323, the pertinent parts thereof are set out in Appendix B.

Five Congressional acts have formed the basis of 10 U.S.C.A. 6323:

1. The Act of February 21, 1946, 60 Stat. 27 is the predecessor of Title 10 U.S.C.A. 6323.

2. Act of April 14, 1949, Ch. 52, 63 Stat. 47, amends Title 34 U.S.C. §855(h), Pub. L. 81-91.

3. Act of August 10, 1956, Ch. 1041, 70A Stat. 399, Pub. L. 84-1028, Repealed 34 U.S.C. §§410(b) and 410(b)(1), and codified them as Title 10 U.S.C.A. §6323(a)-(c). Computation of retirement pay for retired members of the Navy or Marine Corps was codified in 10 U.S.C.A. §6325.

4. Act of September 2, 1958, §1, Ch. 142, 72 Stat. 1509, Pub. L. 85-861. This Act took the language of 10 U.S.C.A. §6325(a)(2) and without change, enacted §6323(e).

5. Act of October 2, 1963, §5(h)(4), 72 Stat. 214, Pub. L. 88-132.

Title 10 U.S.C.A. §§1447-1455 and §2771 are set out in Appendix B. Title 38 U.S.C. 3105 is set out in Appendix B.

There are four Acts of Congress that consider the relationship of federal military retirement pay to the morale of the men in the armed services:

1. Officers Personnel Act of 1947, 61 Stat. 795, Pub. L. 80-381.

2. Career Compensation Act of 1949, 63 Stat. 802, Pub. L. 81-351.

4. Pay Readjustment Act of 1958, 72 Stat. 122, Pub. L. 85-422.

Pertinent comments from the Congressional Record are included in the Reasons for Granting the Writ.

United States Constitution, Article VI, Ch. 2 in Appendix B.

State Statutes.

California Probate Code §201, in Appendix B.

California Civil Code §§4800 and 5119 in Appendix B.

Statement of the Case.

The facts relevant to the questions presented by this petition may be introduced to the Court, as follows:

James E. Fithian, Jr., was the Petitioner in the original Petition for Dissolution of Marriage filed in the Superior Court of the State of California for the County of Orange on March 26, 1971. The Respondent was Camille J. Fithian.

On July 31, 1968, Petitioner was honorably retired from the United States Marine Corps. At that time he had served twenty-two (22) years; four of those years as an enlisted man; eighteen as an officer. Petitioner was married to Respondent for nearly sixteen of his twenty-two years in the Marine Corps, residing in California for only four of those years.

The nature, character and status of compensation received by retired officers of the United States Marine Corps was fully argued and briefs filed in the Superior Court of California, for the County of Orange, the original trial court.

The Interlocutory Judgment of Dissolution of Marriage dated May 1, 1972, specifically met the issue as follows:

> "The court further finds 71% of Petitioner's retirement to be community property or *quasi-community property* and he is ordered to pay her one half of 71% for so long as he continues to receive same." (Emphasis added) ". . . specifically reserve the right to request findings of fact and conclusions of law and reserve the right to appeal as to the issues of property division . . ."

The Court of Appeal, Fourth Appellate District, State of California, affirmed the judgment in an unreported opinion entered on April 9, 1973.

The California Supreme Court affirmed the lower courts at 10 Cal.3d 592; .... P.2d .... on January 3, 1974, a copy of which is reproduced in Appendix A.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT IN THAT THE DECISION BELOW DETERMINED THAT FEDERAL MILITARY RETIREMENT BENEFITS ARE COMMUNITY PROPERTY AND NOT THE SEPARATE PROPERTY OF PETITIONER.

A. This Court in the Leading Case of Wissner v. Wissner (1950) 338 U.S. 655, 70 S.Ct. 398, Established a Test to Determine Congressional Intent With Regard to the Separate Property Character of Funds Paid Pursuant to a Congressional Act.

Wissner answered the question of whether the proceeds of a National Serviceman Life Insurance Policy were the separate property of the insured serviceman or community property of the serviceman and his spouse. This Court reversed the California appellate court and held that the proceeds of the policy were the separate property of the insured, despite the fact that the payments of premiums on the policy came from the earnings of the serviceman during marriage. To reach this conclusion, this Court discussed the conflict between the clear intent of Congress and the California decision which had frustrated that intent:

> "We do not share Appellee's discovery of Congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express directions of the insured. Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It can not stand." (338 U.S. at 659, 70 S.Ct. at 400.)

Wissner provides that Congress must have intended federal military retirement pay to meet certain requirements before the retirement pay would be considered the separate property of the retired serviceman:

1. The first requirement is that military retirement pay must be intended as a method which might *directly enhance the morale of the serviceman.* (338 U.S. at 660, 70 S.Ct. at 401.)

2. The second is that Congress must have intended military retirement pay to be *paid from Congressional appropriations.* (338 U.S. at 658, 70 S.Ct. at 399.)

3. The third is that Congress must have intended *the cost of administering the military pay system to be borne by the United States.* (338 U.S. at 658, 70 S.Ct. at 399.)

4. The fourth is that Congress must have intended that *premiums or contributions to the military retirement system be low.* (338 U.S. 658, 70 S.Ct. at 399); and

5. The fifth is that Congress must have intended the Federal military retirement pay system *to afford as much material protection as possible to the serviceman.* (338 U.S. at 660, 70 S.Ct. at 401.)

It is uncontrovertible that the legislative history of a statute is the proper source to ascertain the intent of Congress as to its ultimate purpose. *United States v. Wise* (1962) 370 U.S. 405, 414, 82 S.Ct. 1354, 1360; See also: *United States v. Zacks* (1963) 375 U.S. 59, 84 S.Ct. 170; *United States v. Kelly* (1964) 382 F.2d 227.

The legislative history of an act includes debates and discussions on the floor of the Congress as well as committee reports. *United States v. City and County*

of San Francisco (1940) 310 U.S. 16, 60 S.Ct. 749; *Gold Kist, Inc. v. United States* (1971), 339 F.Supp. 1249.

It is these sources that Petitioner relies upon in his contention that federal military retirement pay as separate property meets the *Wissner* criteria.

B. Wissner Test Applied.

Petitioner was retired pursuant to the authority of 10 U.S.C.A. 6323 and an analysis of the debates of the five Congressional Acts forming the basis thereof and the four Acts of Congress bearing on the morale of servicemen, conclusively satisfies the *Wissner* criteria.[1]

Space does not permit a full demonstration as in the State briefs of the pertinent relationship of all relevant acts and comments thereto and because of that limitation, Petitioner limits himself to an overview:

(1) *It is clear that Congresss was primarily concerned about raising the morale of the men in the armed services in enacting the entire system of military retirement.*

The Act of February 21, 1946[2] was enacted for the purpose of inducing young men to make a career of the armed services. To accomplish this purpose, Congress provided the servicemen with specific incentives to remain in the services for at least twenty years.

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[1]Officer Personnel Act of 1947; 61 Stat. 795, P.L. 80-381; Career Compensation Act of 1949; 63 Stat. 802, P.L. 81-351; Career Incentive Act of 1955; 69 Stat. 19, P.L. 84-20; Pay Readjustment Act of 1958; 72 Stat. 122, P.L. 85-422.

[2]An act to provide additional inducement to citizens of the United States to make a career of the United States Military or Naval Service, and for other purposes. Ch. 34 Sec. 6, 60 Stat. 27, P.L. 79-305.

These incentives included four provisions in the area of retirement; the statutory age of retirement was lowered, a new system to compute retirement pay was established, a man was allowed to retire after only twenty years of service, and the serviceman was not required to make any contributions to his retirement fund.

Petitioner contends that the general Congressional purpose in enacting the Act of February 21, 1948, was to provide meaningful incentives, which would raise the level of morale of the servicemen by establishing a liberal and generous retirement system.

(2) *The second is that Congress must have intended military retirement pay to be paid from Congressional appropriations.*

The following excerpt from the Congressional Record of a dialogue between Messrs. Cochran and Vinson is illustrative of the fact that Congress specifically undertook to have the benefits paid from Congressional appropriations. The dialogue refers to the Act, last mentioned:

> *Mr. Cochran,* Representative from Missouri, "They get so much of their basic pay when they retire?"
>
> *Mr. Vinson,* "Exactly".
>
> *Mr. Cochran,* "They never contribute one nickel toward any retirement fund. Is that correct?"
>
> *Mr. Vinson,* "That is absolutely correct." (*91 Cong. Rec. 12465.*)

(3) *The third is that Congress must have intended the cost of administering the military retirement pay system to be borne by the United States.*

(4) *The fourth is that Congress must have intended that premium or contributions to the military retirement system be low.*

Obviously, since there are no premiums or contributions required to be paid by the serviceman, all liabilities must be paid from Congressional appropriation and the cost of administering the system must be borne by the United States. Congressional comments during debate over a subsequent act, also to become part of 10 U.S.C.A. 6323,[3] are informative:

> "Fortunately, we have for our military personnel the most liberal retirement provisions our subcommittee was able to learn about anywhere in the world. The retirement compensation is paid by the Federal government . . . as yet it has not been necessary to care for any contributions by the personnel involved. The retirement is paid for by direct appropriation, with no contribution." (*104 Cong. Rec. 7613;* remarks of Senator Stennis of Mississippi.)

(5) *The fifth is that Congress must have intended the Federal military retirement system to afford as much material protection as possible.*

This purpose is inherent in the Federal military retirement system and in all five acts forming 10 U.S.C.A. 6323; specific attention is invited to the recomputation section and to the cost of living provisions of the *Act of October 2, 1963:*[4]

> "First to improve the attraction and retention of service members for career military service by

[3]Act of June 1, 1958; 72 Stat. 122, Pub. L. 85-422. Pay Readjustment Act of 1958.

[4]Act of October 2, 1963, Sec. 5(h)(4), 77 Stat. 214, Pub. L. 88-132.

> providing increased basic pay with the larger percentages increases at points of retention; second to correct certain inequities in the military compensation (and retirement) system; third, to provide as a *permanent statutory matter an equitable basis for adjusting retired pay for members after retirement,* based on cost-of-living increases, applicable to all retired personnel." (Emphasis added. 109 Cong. Rec. 14200; comment of Mr. Cannon, Representative from Missouri.)

The Congressional purpose throughout the history of military retirement legislation has been to insure that the retired serviceman be able to live in the same standard post-retirement as he had prior as a means of providing as much material protection as possible. (109 Cong. Rec. 14202.)

Through the test established in *Wissner, supra,* Petitioner has demonstrated that Congress specifically intended Federal military retirement pay to be separate property of the recipient, yet a California decision has determined that Federal military retirement pay is community property.

When such a conflict occurs, the outcome is clear; the California decision must yield to the clear and specific intent of Congress. (Article VI, Clause 2 of the United States Constitution; *Free v. Bland* (1962) 369 U.S. 663, 82 S.Ct. 1089; *Wissner v. Wissner* (1950) 338 U.S. 655, 70 S.Ct. 398.)

II.

SHOULD THE COURT DECIDE THAT THE WISSNER TEST IS NOT DISPOSITIVE, THEN THE COURT BELOW HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT THERETOFORE DETERMINED BY THIS COURT.

(a) Assuming *arguendo* that *Wissner* has left open the character of Federal military retirement benefits, then it must be Federal law that will govern the interpretation of a Federal right. *Free v. Bland, supra;* and in the absence of an applicable Act of Congress, it is for the Federal Courts to fashion governing rules according to its own standards and either to accept or reject state law. *Clearfield Trust Co. v. United States* (1945) 318 U.S. 363.

The opinion below proceeds upon the somewhat parochial premise that California community property law is not inconsistent with Congressional intent in that the lower Court (see pp. 9A and 10A of Appendix A) fails to find any indication that treating the pay as community property circumvents the Congressional scheme and therefore the states have jurisdiction to characterize the nature of a Federal right.

It is Petitioner's contention that the United States has exclusive jurisdiction to characterize a federally created right and that the states cannot operate in the area until or unless the state law has been absorbed as the Federal rule.[5]

The Federal statutes are silent as to the character of military retirement pay and there is absolutely no indication that Congress has ever considered that retirement

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[5]Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 488, 534 (1954).

pay is a partnership asset divisible at divorce or dissolution of marriage. The statutes do not even refer to, let alone provide for, the spouse of the retiree.

To the contrary there is very strong indication that Congress intended the retirement pay to be the separate property of the recipient and a "personal entitlement that accrues to the retiree" and which ceases upon the death of the retired member. *U.S. Code Congressional and Administrative News,* 70th Congress, 2nd Sess. (1968) Vol. 3, at 3300; Navy Guide for Retired Personnel and their Families, *NAVPERS* 15891 at page 89 (1970).

(b) ***The entire system of Federal Military Retirement is inconsistent with the California community property system and these inconsistencies evidence a strong Congressional disregard of the community property system.***

In 1953, Congress enacted the Contingency Option Plan, which allowed a retiree to provide an annuity for eligible widows and dependent children after he died. The plan was subsequently renamed the Retired Serviceman's Family Protection Plan (hereinafter referred to as the RSFPP) and because of inadequacies therein, Congress enacted the Survivor Benefit Plan (10 U.S.C.A. §§1447-1455) in 1972.

The RSFPP was funded with deductions from the retiree's payments and continued even if there was no longer an eligible beneficiary. (*U.S. Code Congressional and Administrative News,* 90th Cong., 2nd Sess.

(1968) Vol. 3, 3307.) Congress rectified this anamoly by providing an automatic termination of deduction when there was no longer an eligible beneficiary (*Id.* at 3301-3306) and specified the reason therefor:

> "To safeguard the participant's future retired pay when the spouse predeceases the member, *or* a *divorce* occurs . . ." *Id.* at 3307. (Emphasis added.)

Clearly Congress realized that Federal military retired pay was the separate property of the retiree. If, however, states are to be permitted to find these same benefits community, then the state will be allowed to do exactly that which the Congress sought to guard against; that is, the states will compel the retiree to share with the spouse whom Congress explicitly found ineligible for voluntary coverage.

The RSFPP proved inadequate because of the prohibitive cost to the retiree and as a result Congress enacted the Survivor Benefit Plan, which is now Sections 1447-1455 of Title 10 U.S.C.A., hereinafter referred to as the S.B.P. The S.B.P. is pertinent for two reasons. First, it was funded by deductions from the retiree's pay and second, the serviceman had to elect *not* to be covered. If he so elected, he was required to file written notice with the proper officials and to *notify his spouse of said election.* (10 U.S.C.A. §1448 (a).)

Clearly, if California were allowed to apply its community property laws, then the retiree's pay is already community property and Congress should have exempted the *notice provisions* in community property states. Congress never provided this exception and it must be concluded that Congress has never intended

any part of the Federal military retirement pay to be a community property asset.

Reinforcement of this conclusion is found in that Congress specifically provided that unpaid pay and allowances would be disbursed upon the death of the retiree to those beneficiaries whom the retiree designated. (Navy Guide for Retired Personnel and their Families, NAVPERS 15891C Para. 46, p. 23 (1970); 10 U.S.C.A. § 2771.) Query, if Federal military retired pay is a community property asset, then how could the retiree designate who is to receive all Federal monies that are due when he dies? This Federal power of testamentary disposition is on its face repugnant to the California concept of community property, which provides that one-half of the community property passes to the surviving spouse. *California Probate Code* §201.

The inconsistencies abound as is further illustrated by the fact that under 38 U.S.C. 3105 (1970) a disabled serviceman is entitled to waive all or part of his retired pay to receive a Veteran's Administration pension and thereby convert part of his pay to a gratuity, *Lynch v. United States* (1934) 292 U.S. 571, 577; *Berkey v. United States* (1966) 361 F.2d 983, 987, 988; and thus his separate property. *California Civil Code* §4800.

Finally, we must consider what occurs when the benefits of the former spouse, whom Congress intentionally failed to provide for, are compared to the benefits of the widow, whom Congress specifically provided for.

If Federal military retirement pay is community property, then upon dissolution the share that is the widow's would become her separate property. *Phillip-*

son v. Board of Administration (1970) 3 Cal.3d 32, 42, n. 9. Thereafter, if she remarried the retiree would be obligated to contribute to the support of the second husband and the children of the second marriage.

Contrasted to this result, is the treatment of the widow, who under the S.B.P. is receiving an annuity. The *annuity terminates* upon remarriage. [10 U.S.C.A. §1450(b).] Thus, the only conclusion to be reached is that either the widow, whom Congress preferred, is to be treated worse than the ex-wife, whom Congress neglected, "or perhaps more logically that those it neglected have no community property right." (Is Armed Services Retired Pay Really Community Property? Judge B. Abbot Goldberg, Cal. State Bar Journal, Vol. 48, No. 1 at p. 89.)

It is submitted that the following hypothetical clearly illustrates that Congress has never intended a divorced spouse to share in the retired serviceman's pay: Let us assumed two married military officers enter the service on the same date and serve the same functions for nineteen years. In the twentieth year, one officer is transferred to a community property state and one to a non-community property state and thereafter both officers retire. The spouses of both officers thereafter obtain a divorce and subsequently remarry. The wife in the community property state would have a vested one-half interest in his ex-spouse's retirement. The ex-wife in the common law state will most likely have received alimony based upon her need and the income of her ex-spouse *until* she remarried, when the alimony would cease. In light of the Congressional treatment of the S.B.P. and Federal military retirement in general, it is incomprehensible that Congress intended to have Federal monies subject to such unequal treatment.

Petitioner relies upon the supremacy clause of the United States Constitution, Article VI, Clause 2 to support the proposition that since Congress clearly intended that military retirement be the "personal entitlement" of the serviceman[6] and because the entire scheme of the military retirement system reflects a clear Congressional disregard of the state community property system, that the State court decision and statutory law must give way to the *express will of Congress.*

III.

THE CALIFORNIA SUPREME COURT BY CHARACTERIZING FEDERAL MILITARY PAY AS COMPENSATION FOR PAST SERVICES, HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE INCONSISTENTLY WITH DECISIONS OF THE FEDERAL COURT. THIS QUESTION HAS NOT THERETOFORE BEEN DECIDED BY THIS COURT.

Federal Courts distinguish between the character of Federal military retirement pay and Federal pensions. Extensive research of California decisions and indeed the lower court's opinion (See A16) indicate that California refuses to recognize a distinction of a pension as a gratuity under California law.

Federal Courts, however, treat Federal retirement pay entirely different than Federal pension. This distinction has appeared in the context of whether Congress intended "federal retirement pay" to be a "federal pension."

> "An examination of the Acts of Congress through the years reveals that when the word 'pension' was used, it meant 'pension' (Federal defini-

[6] U.S. Code Congressional and Administrative News, 90th Congress, 2nd Session (1968) Vol. 3 at 3300.

tion) and when 'retirement pay' was used it meant 'retirement pay' (Federal definition). It is evident that Congress recognizes that each word has its own individual meaning and by such usage distinguishes between 'pensions', 'retirement pay', 'compensation', 'hospital benefits,' etc." *Lemly v. United States* (1948) 75 F.Supp. 248, 249, 117 Ct. Cl. 365.)

The Court in *Lemly, supra,* then went on to say, "In other words, when a *pension* is paid someone, he is considered all through, his services are over, and he is pensioned 'off'. Furthermore, a pension is paid after the service has been performed without any regard to the actual performance of service as a gratuitous recognition of a moral or honorary obligation of the government. When a person is 'pensioned off' by the government, that government no longer has any control over his services. He is actually all through serving the government and yet he receives his pension as long as he lives." (*Id.* at 249.)

Therefore, a federal "pension" is recognized by Federal Courts as pay for services that have already been performed. Thus, even though he receives Federal Funds, the former employee is no longer subject to recall or control by the Federal government.

Federal military retirement pay, on the other hand, is treated entirely different by the Federal Courts:

> "*Retirement pay, on the other hand, is a continuation of active duty pay on a reduced basis. Even though an officer is retired from active duty and is receiving retirement pay, he is still subject to call on active duty as long as his physical con-*

dition will permit. He is still an officer in the service of his country even though on the retired list. (Lemly v. United States, supra, at 249)." (*Emphasis added.*)

This distinction has been consistently followed in Federal Courts:

> "Plaintiff says a retired officer does not hold an office. We think that an officer in the Navy, though retired, is still an officer. He continues to draw pay as a retired officer. Being an officer, he is subject to recall whether he wishes to serve or not. He is still subject to naval discipline." Citing *Lemly v. United States, supra; Hotinsky v. United States* (1961) 292 F.2d 508, 510.

Petitioner *has not* ended his obligations to the United States. He is subject to recall at any time, as long as his physical condition permits. He is subject to discipline of his supervisors. He must inform them of his place of residence.

The Petitioner's retired pay is subject to forfeiture if he loses his citizenship or acquires foreign citizenship by a voluntary action inconsistent with his oath of allegiance to the United States and *thus repugnant to his status* as a member of the United States Armed Forces. (See Marine Corps Retirement Guide (1972) NAVMC 2642 Ch. 46, p. 54.) The retiree is subject to the U.C.M.J. He can forfeit his pay by securing employment with a foreign government without prior approval. (*Id.* Ch. 47, p. 55.)

For this, petitioner receives active duty pay, albeit at a reduced rate, in the form of Federal military retirement pay. (*Lemly v. United States, supra,* 249.)

Relying on these Federal decisions, petitioner submits that Federal military retirement pay must be treated in a state dissolution proceeding in the same manner as active duty pay.

It is the rule in California, that active duty pay, as with any pay received for employment, is not subject to distribution in a *dissolution proceeding*. (California Civil Code §5119.)

Therefore, petitioner contends that Federal military retirement pay characterized as active duty pay at a reduced rate by the Federal Courts, is *not* within the jurisdiction of the California Courts in a dissolution proceeding. Petitioner's contention is further supported by decisions in the Federal *military* courts.

In *United States v. Hooper* (1958) 9 U.S.C.M.A. 637, 26 C.M.R. 417, the court ruled that retired servicemen are still members of the Armed Services.

Courts which have heretofore expressed opinions on this question have concluded "that retired personnel are a part of the land or naval forces . . ."

> The Court of Claims has held retired personnel a part of the military force of this country. *Tyler v. United States*, 16 Ct. Cl. 223; *Franklin v. United States*, 29 Ct. Cl. 6. (*Id.* at 642.)

The Court expressly stated that retired pay is compensation, so that the serviceman be available:

> "The salaries they receive are *not* solely recompenses for past services, but a means devised by Congress to assure their availability and preparedness in further contingencies." (*Id.* at 645.) (Emphasis added.)

Relying upon the authority provided by the Federal District Courts, the Federal Court of Appeals, and the United States Court of Claims, as well as the United States Court of Military Appeal, Petitioner respectfully contends that Federal military retirement pay is *not* subject to characterization by the California courts as compensation solely for past services.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion of the Supreme Court of California in this action.

Dated: March 13, 1974.

Respectfully submitted,

STEVEN E. BRIGGS,
Attorney for Petitioner.

LAWTON, CHRISTENSEN, FAZIO,
McDONNELL, BRIGGS & WARD,
Of Counsel.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

In re the Marriage of James E. and Camille J. Fithian, Jr. James E. Fithian, Jr., Appellant, v. Camille J. Fithian, Respondent. L.A. 30165, (Super. Ct. D-45860).

Filed: January 3, 1974.

James E. Fithian, Jr., appeals from an interlocutory judgment ordering the dissolution of his marriage to Camille J. Fithian and establishing the community property rights of the respective parties. Husband specifically challenges the trial court's characterization of a portion of his federal military retirement pay as community property, contending such a determination is forbidden to the states by the supremacy clause (art. VI, cl. 2) of the United States Constitution. We conclude federal military retirement pay is properly the subject of California community property law and therefore affirm the judgment.

After serving 22 years in the United States Marine Corps, husband retired with the rank of lieutenant colonel under the authority of title 10, United States Code, section 6323.[1] Pursuant to the provisions of that

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[1]Section 6323 provides in pertinent part: "(a) An officer of the Navy or Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

"(b) For the purposes of this section (1) an officer's years of active service are computed by adding all his active service

(This footnote is continued on next page)

section, husband began to draw retirement pay, referred to in the statute as "retired pay," on a monthly basis and remains eligible to do so for the duration of his life. Two years subsequent to his retirement, husband commenced the instant dissolution proceeding. The trial court found the parties had been married for 16 of husband's 22 years in the Marine Corps and had become residents of California prior to husband's retirement. Therefore, the trial court concluded 71 percent of husband's retirement pay is part community property and part quasi-community property subject to the jurisdiction of California courts, and directed husband to pay 35½ percent of his post-dissolution retirement benefits to wife as he receives them.

The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested,[2] are community property

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in the armed forces; and (2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent or temporary appointments in grades above warrant officer, W-1.

"(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired (1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or (2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade. . . .

"(e) Unless otherwise entitled to a higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based. . . ."

[2]The right to retirement benefits "vests" when an employee acquires an irrevocable interest in a fund created by his own contributions and/or the contributions of his employer. The

subject to equal division between the spouses in the event the marriage is dissolved. (Waite v. Waite (1972) 6 Cal.3d 461; Phillipson v. Board of Administration (1970) 3 Cal.3d 32; Benson v. City of Los Angeles (1963) 60 Cal.2d 355; French v. French (1941) 17 Cal.2d 775; Crossan v. Crossan (1939) 35 Cal.App.2d 39.) Underlying the community treatment of retirement benefits is the concept that they do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee. Thus whether an employee is required to make contributions to the retirement fund is irrelevant to the ultimate characterization of the benefits as community property. (Phillipson v. Board of Administration (1970) supra; Sweesy v. Los Angeles etc. Retirement Bd. (1941) 17 Cal.2d 356.) Furthermore, the principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship. (Waite v. Waite (1972) supra; Phillipson v. Board of Administration (1970) supra; Estate of Perryman (1955) 133 Cal.App.2d 1; French v. French (1941) supra.)

The conclusion follows that husband's federal military retirement pay must be considered community property in accordance with established principles of California law. Although the retirement fund was non-

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"vesting" of retirement benefits must be distinguished from the "maturing" of those benefits, which occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of the employee. (Williamson v. Williamson (1962) 203 Cal.App.2d 8, 11; see also Kent, *Pension Funds and Probiems Under California Community Property Laws* (1950) 2 Stan.L.Rev. 447, 463, 465.)

Husband does not contend his rights to the retirement fund had not vested during the marriage.

contributory, husband's rights to the benefits vested during marriage and constituted an integral part of his compensation for service in the military.

Husband contends, however, the treatment of federal military retirement pay as community property frustrates the specific purpose of Congress in enacting the federal military retirement pay system, and therefore is beyond the jurisdiction of the California courts by virtue of the supremacy clause of the United States Constitution.[3] It is asserted that the several cases in California and other community property states holding federal military retirement pay to be community property have failed to explore the crucial issue whether federal law permits the states to make such a determination. (In re Marriage of Karlin (1972) 24 Cal.App.3d 25; Bensing v. Bensing (1972) 25 Cal. App.3d 889; In re Marriage of Brown (1972) 27 Cal. App.3d 188; Dominey v. Dominey (Tex. 1972) 481 S.W.2d 473; Busby v. Busby (Tex. 1970) 457 S.W.2d 551; Mora v. Mora (Tex. 1968) 429 S.W.2d 660; Kirkham v. Kirkham (Tex. 1960) 335 S.W.2d 393; LeClert v. LeClert (N.M. 1969) 453 P.2d 755; Morris v. Morris (Wash. 1966) 419 P.2d 129) (dictum).)

When there have been questions of property law involving a conflict between a state decision and a valid federal statute, the United States Supreme Court has determined that the supremacy clause requires the state law to yield no matter how clearly the subject matter

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[3]Article VI, clause 2, of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

otherwise falls within the state's acknowledged sphere of power. (Free v. Bland (1962) 369 U.S. 663; Wissner v. Wissner (1950) 338 U.S. 655.) Our task, therefore, is to ascertain whether the application of California community property law to husband's federal military retirement pay interferes in any way with the accomplishment of the goals of Congress in creating the current military retirement scheme.[4]

The contention that Congress intended federal military pay to be the separate property of the recipient is based in large measure on Wissner v. Wissner (1950) supra, 338 U.S. 655. In *Wissner*, the trial court ordered the beneficiary of life insurance proceeds under the National Service Life Insurance Act (38 U.S.C. § 701 et seq.) to pay half the proceeds, as community property, to the deceased soldier's widow. The United States Supreme Court held the order invalid under the supremacy clause on the ground that the specific language of the act,[5] construed in the light of congres-

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[4]In a recent article, *Is Armed Services Retired Pay Really Community Property?* (1973) 48 State Bar J. 12, Judge B. Abbott Goldberg maintains that the characterization of a federally created property right is exclusively a matter of federal law, and state law may not operate unless Congress specifically intended it to do so. *Free* and *Wissner* make clear, however, that state law may determine the treatment accorded locally to a federally created property right so long as the result does not frustrate the express or implied purposes of the federal legislation. (See also Bank of America v. Parnell (1956) 352 U.S. 29.)

Judge Goldberg's article also supports several of husband's contentions regarding congressional intent which we consider *infra*.

[5]Title 38, United States Code, section 717(a), provides: "The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries."

sional intent, gave the serviceman the absolute right to choose the beneficiary of the policy and hence was invulnerable to the application of state community property law.

Wissner does not require community property states to classify the proceeds of National Service Life Insurance policies as separate property, but only to refrain from administering those incidents of community property law which would frustrate the congressional plan. In Estate of Allie (1958) 50 Cal.2d 794, we held that insurance proceeds payable to the serviceman's estate may be considered community property since such a classification does not hinder the insured's free choice of beneficiaries. It is clear, therefore, *Wissner* did not establish a general rule that federal employment benefits cannot be treated as community property, but merely construed a specific statute in view of the congressional intent it embodied.[6] *Wissner* has no controlling impact on the case at bar except to mandate us to examine the legislative goals behind the federal military retirement pay system.

Nevertheless we are asked to measure the property involved herein against a five-part *Wissner* "test" which purportedly determines whether Congress intended a federally created property right to be immune from community property characterization by the states. According to this asserted yardstick, federal benefits must be the separate property of the recipient if (1) they were intended to directly enhance morale; (2) they were intended to be paid from congressional appropria-

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[6]*Wissner*, for example, expressly refrained from deciding whether army pay could be classed as community property and whether the soldier's widow could recover half the insurance premiums derived from that pay.

tions; (3) their administration costs were intended to be borne by the United States; (4) premiums or contributions to the system were intended to be low; and (5) they were intended to afford as much material protection as possible to the recipient. Although the federal military retirement pay system doubtless satisfies each of the asserted criteria, the source of these purported standards is a tortured reading of the *Wissner* opinion. No precise language in *Wissner* is quoted in the formulation of this "test" of congressional intent; rather the standard is devised by paraphrasing a series of statements by the court taken out of context and artificially grouped together.[7] Aside from the vacuous content of the asserted "tests," which are so broad as to embrace virtually all federally created benefit plans, *Wissner* makes plain that it is embarking on the task of specific statutory construction, and not setting forth general propositions by which to evaluate the goals of Congress in other legislative enactments.

We have studied Senate reports and congressional hearings concerned with the adoption of the federal military retirement pay system in an effort to ascertain any legislative intent to preserve the benefits of the system as the separate property of the recipient. We fail to find in the legislative background any indication that Congress intended military retirement pay to be separate property, or conversely, that treating the pay as

[7]The first and fifth "tests," that the benefits be intended to directly enhance morale and afford material protection, are adopted from a discussion in *Wissner* exploring the constitutionality of the National Service Life Insurance Act. The remaining three "tests," that costs be borne by the United States and supported by congressional appropriations and that premiums be low, derive from a discussion of characteristics peculiar to the National Service Life Insurance system.

community property circumvents the congressional scheme. There is considerable evidence that Congress enacted the federal military retirement pay system in order to bolster the morale of the serviceman and to provide him with an incentive to remain in the armed services, as well as to afford him material protection in his later years. It does not follow therefrom that applying community property law to retirement pay creates a disincentive to establishing a career in the military, or detracts from a serviceman's spirit or future security.

Husband argues that Congress explicitly determined federal military retirement pay is the "personal entitlement" of the serviceman, "payable to the member himself as long as he lives," and therefore foreclosed the states from applying a community property characterization which impinges on the concept of "personal entitlement." (1968 U.S. Code Cong. & Admin. News, p. 3300; see also Sen. Rep. No. 1480, 90th Cong., 2d Sess. (1968).) The legislative materials cited, however, make clear that Congress used the phrase "personal entitlement" to signify that retirement benefits cease with the death of the serviceman, and provide no continuing means of support for the serviceman's widow or family.[8]

It is next suggested that if military retirement pay ceases with the death of the serviceman, then Congress must have intended that wife have no vested rights in the benefits. No part of a serviceman's retirement pay passes to the estate of his wife should she predecease

[8]Congress' reference to military retirement benefits as the "personal entitlement" of the serviceman occurs in the context of underscoring the need for an annuity plan to provide for a deceased serviceman's family.

him, and therefore, it is argued, this aspect of the plan is significantly incompatible with our community property scheme. This contention, however, overlooks the fact that retirement benefits in California, though community property, do not necessarily constitute an inheritable legacy. Consistent with community property law, a wife may maintain a nontestamentary community property right in benefits which extends only during the lifetime of her husband. (Waite v. Waite (1972) supra, 6 Cal.3d 461.)[9] Thus we conclude that the application of California community property law does not prevent federal military retirement pay from retaining its character as the "personal entitlement" of the serviceman in the sense Congress employed the phrase.

Because federal military retirement pay carries with it no right of survivorship, the characterization of benefits as community property places the serviceman's ex-wife in a somewhat better position than that of his widow. Such result is anomalous, husband contends, in light of the fact that Congress created annuity plans specifically to support a serviceman's widow,[10] but made no provisions in favor of a serviceman's divorced wife. The point is not persuasive. Congress' concern for the welfare of soldiers' widows sheds little light on Congress' attitude toward the community treatment of

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[9]In *Waite* we held that in view of the purpose of the Judges' Retirement Law (Gov. Code, § 75000 *et seq.*) to insure the sustenance of retired judges and their wives, and not to benefit their heirs, wife's heirs could not be awarded benefits under the law, notwithstanding the contention that wife would thereby be deprived of her equal portion of husband's pension.

[10]See the revised version of the Retired Serviceman's Family Protection Plan, title 10, United States Code, section 1431 *et seq.*, and the Survivor's Benefit Plan, title 10, United States Code, section 1447 *et seq.*

retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death. It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property for a source of income.[11]

It is true, as husband points out, that if retirement benefits are community property, upon divorce the portion awarded to the ex-wife will become her separate property. (See Phillipson v. Board of Administration (1970) supra, 3 Cal.3d 32, 44.) It does not follow, however, that should the ex-wife die, her rights would descend to her heirs, and that the serviceman could thus become obligated to the ex-wife's future husband or subsequent children. In California is it clear that the heirs of the ex-wife are not entitled to the portion of the retirement benefits the ex-wife would have received had she lived. (Waite v. Waite (1972) supra, 6 Cal.3d 461.) As stated in Bensing v. Bensing (1972) supra, 25 Cal.App.3d 889, 894 (hg. den.), "The pension terminates with the death of the husband, and wife's share also terminates if she predeceases the husband."

California community property law is not irreconcilable with the military annuity program and as a result incompatible with the retirement system which sup-

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[11]Similarly, there is little relevance to the argument that Congress could not have intended military retirement pay be community property because the ex-wife would retain rights against the retired serviceman despite her remarriage, while an annuity to a serviceman's widow is suspended or terminated by remarriage. (10 U.S.C. § 1450.) The treatment of ex-wives and widows does not present analogous problems or considerations.

plied the premiums for the annuity fund. Although insurance proceeds are community property to the extent the policy was purchased with community funds (Grimm v. Grimm (1945) 26 Cal.2d 173), the principle does not extend to annuity plans created in the employment context. In Benson v. City of Los Angeles (1963) supra, 60 Cal.2d 355, we held that the rights of a widowed second wife take precedence over those of an ex-wife whose community funds were converted from husband's retirement plan to a related annuity contract. Characterizing retirement benefits as community property, therefore, does not conflict with the serviceman's right to choose an eligible beneficiary under the annuity plans Congress established in coordination with the retirement system.[12]

Although a serviceman's retirement pay does not pass to his family when he dies, the serviceman retains the right to designate a beneficiary to receive any arrearages in pay which are due but unpaid at his death. The designation right is derived from a statute which gives the serviceman a power of testamentary disposition over any money owed to him by the federal government, and it is contended that community property laws interfere with husband's right to choose a beneficiary.[13] However, unlike the insurance program in

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[12]One may rationally argue it is unfair to apply California community property law to the retirement benefits of a soldier who served outside California for the greater part of his term of duty, but retired in California comparatively recently. However, California's somewhat unique concept of quasi-community property is of settled validity (Addison v. Addison (1965) 52 Cal.2d 558), and no more interferes with the military retirement system than does the application of traditional community property principles to compensation from other employment.

[13]Title 10, United States Code, section 2771, provides: "(a) In the settlement of the accounts of a deceased member of the

(This footnote is continued on next page)

Wissner in which the right to choose a beneficiary was an integral and explicit part of the federal plan, here we have a designation right constituting no more than a contingency procedure to distribute whatever money, if any, is due to the serviceman but which he failed to collect. We cannot perceive any Congressional intent that the designation right be central to the whole military retirement system or that it foreclose the states from classifying retirement benefits as community property.

Under federal law a disabled serviceman may waive his retirement pay and instead receive a pension from the Veterans Administration. (38 U.S.C. § 3105.) Because some federal cases have referred to pension benefits as gratuities,[14] husband contends such benefits must be the separate property of the serviceman, and therefore retirement pay must be so characterized as well. While it would indeed be inconsistent with community property law to allow the husband to transmute community property into his own separate property, pensions are not considered gratuities under California law and are classed as community property for precisely the same reasons that retirement benefits are community property. (Waite v. Waite (1972) supra, 6 Cal.3d 461; Phillipson v. Board of Administration (1970) supra, 3 Cal.3d 32.) Thus, a disabled service-

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armed forces . . . an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living at the date of death: (1) Beneficiary designated by him in writing to receive such an amount. . . ."

[14]In Lynch v. United States (1933) 292 U.S. 571, the court refers to pensions as gratuities in the sense that, so long as they are not vested, the federal government can redistribute or withdraw them at any time according to the discretion of Congress. The reference has no impact on the states' ability to characterize pension rights under local principles of property law.

man's option to receive a pension instead of retirement pay has no relevance to the issue whether the states may treat either type of benefit as community property.

Next, it is said that California is, in effect, attaching the retirement pay of the serviceman by judicially dividing it as community property, and that, contrarily, Congress intended retirement pay to be immune from attachment since it failed to enact a proposed attachment rider to the Survivor's Benefit Plan (10 U.S.C. § 1447, et seq.). However, the relevant legislative debate makes clear that Congress deleted the attachment provision chiefly because it was extraneous to the annuity bill and because its passage would treat servicemen differently from all other federal employees whose wages, to date, are not subject to attachment by state courts.[15] Congress' action in failing to enact the attachment rider indicates no more than a desire to postpone the decision on the propriety of state attachment proceedings until such time as all federal payments are under its scrutiny. In any event, an award of a community property share of retirement benefits to wife involves neither an attachment of federal funds nor a demand on the federal paymaster, but instead orders husband after he receives the benefits

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[15]Thus the Senate Committee on Armed Services reported: "If the attachment provision were included in this bill, it would make an exception of military retired pay by providing that it alone, among all Federal pays and annuities, would be subject to attachment. The committee felt that this would be an unwarranted and unfair discrimination against the retiree.

"An attachment provision is extraneous to the question of survivor benefit legislation, and all its ramifications could not be evaluated to the extent appropriate or desirable.

"The committee believes that, although the attachment provision may be justified in many instances, it should be addressed from the perspective of its application to all Federal pays and annuities." (118 Cong. Rec. S 14335.)

to fulfill his obligation in the future pursuant to the judgment of dissolution.

Husband finally contends that even if federal military retirement pay can properly be considered community property, such a characterization must cease upon the dissolution of the marriage because retirement pay represents a continuation of active duty pay on a reduced basis, and not remuneration for services performed while husband was married. He relies principally on Lemly v. United States (Ct. Cls. 1948) 75 F.Supp. 248, in which the court purportedly declared a distinction as a matter of federal law between a pension, which is compensation for services previously rendered, and retirement pay, which constitutes consideration for the recipient's continued obligations to the government.[16] In *Lemly*, the court of claims was faced with the question whether a naval reserve officer who contracted a disabling disease while on active duty was entitled to post-retirement compensation for his service-connected disability. Because the court of claims has jurisdiction over claims for retirement pay, but not claims for pensions, the court distinguished the two types of benefits, and determined that retirement pay is compensation for services presently being performed since the recipient is subject at all times to recall to active duty.

Whether retirement pay is a pension and thus excluded from the jurisdiction of the court of claims is

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[16]To some extent Hostinsky v. United States (Ct. Cls. 1961) 292 F.2d 508, and United States v. Hooper (1958) 9 U.S.C.M.A. 637, distinguish pensions from retirement pay. *Hostinsky* and *Hooper*, however, do not address the issue of which services, past or present, retirement pay rewards, but merely stand for the proposition that retired officers are still members of the armed services with certain limited duties.

far removed from the problem of classifying retirement benefits under state community property law, and is not authoritative on the latter issue. Furthermore, in Gordon v. United States (Ct. Cls. 1956) 140 F.Supp. 263, the court of claims reconsidered the nature of retirement pay and concluded that it is awarded to servicemen "for the reason that it is something they earned while in the service of their country."

Apart from the foregoing judicial declarations on tangential issues, military retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military, and not to compensate him for his limited responsibility to the government after his retirement. Indeed, the amount of retirement pay a serviceman receives bears no relation to any continuing duties after retirement, but is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement. (10 U.S.C. § 6323 (e).) Moreover, should the serviceman actually be recalled to active duty, he is not only additionally compensated according to the active duty pay scale, but his rate of retirement pay is also increased thereafter. (10 U.S.C. § 1402.) The conclusion is inescapable that retirement pay is awarded in return for services previously rendered and therefore is divisible as community property to the extent the serviceman was married while on active duty.

Because we can find no evidence that the application of California community property law interferes in any way with the administration or goals of the

federal military retirement pay system, we hold that military retirement pay properly can be characterized as community property in accordance with established principles of California law. No objection has been made to the mathematical computation of the trial court and it appears to be accurate.

The judgment is affirmed.

Mosk, *J.*

We Concur:

Wright, *C. J.*
McComb, *J.*
Tobriner, *J.*
Burke, *J.*
Sullivan, *J.*
Clark, *J.*

APPENDIX B.

Statutes.

10 U.S.C.A. § 1447 SURVIVOR BENEFIT PLAN Definitions

In this subchapter:

(1) "Plan" means the Survivor Benefit Plan established by this subchapter.

(2) "Base amount" means—

(A) the amount of monthly retired or retainer pay to which a person—

(i) was entitled when he became eligible for that pay; or

(ii) later became entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability retired list; or

(B) any amount less than that described by clause (A) designated by that person on or before the first day for which he became eligible for retired or retainer pay, but not less than $300;

as increased from time to time under section 1401a of this title.

(3) "Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

(A) was married to him for at least two years immediately before his death; or

(B) is the mother of issue by that marriage.

. . .

§ 1448. *Application of plan*

(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. However, a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the month after his election is received by the Secretary concerned.

(b) A person who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person.

(c) The application of the Plan to a person whose name is on the temporary disability retired list terminates when his name is removed from that list and he is no longer entitled to retired pay.

(d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that

pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a) (1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

Added Pub.L. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 707.

. . .

§ 1450. *Payment of annuity: beneficiaries*

(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies, a monthly annuity under section 1451 of this title shall be paid to—

(1) the eligible widow or widower;

(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section; or

(3) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall

be paid to the widow or widower while the widow or widower is living or, if the widow or widower remarries before reaching age 60, until the widow or widower remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity will be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive.

(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity

payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

(f) An unmarried person who elects to provide an annuity to a person designated by him under subsection (a) (3), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in the last three sentences of section 1448(a) of this title.

(g) Except as provided in section 1449 of this title or in subsection (f) of this section, an election under this section may not be changed or revoked.

(h) Except as provided in section 1451 of this title, an annuity under this section is in addition to any other payment to which a person is entitled under any other provision of law. Such annuity shall be considered as income under laws administered by the Veterans' Administration.

(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

Added Pub.L. 92-425, § 1 (3), Sept. 21, 1972, 86 Stat. 708.

Legislative History. For legislative history and purpose of Pub. L. 92-425, see ..... 1972 U.S.Code Cong. and Adm.News, p.

§ 1451. *Amount of annuity . . .*

§ 1452. *Reduction in retired or retainer pay*

(a) The retired or retainer pay of a person to whom section 1448 of this title applies who has a spouse, or who has a spouse and a dependent child, and who has not elected to provide an annuity to a person designated by him under section 1450(a) (3) of this title, or who had elected to provide such an annuity to such a person but has changed his election in favor of his spouse under section 1450(f) of this title, shall be reduced each month by an amount equal to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount. As long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under regulations of the Secretary of Defense.

(b) The retired or retainer pay of a person to whom section 1448 of this title applies who has a dependent child but does not have an eligible spouse, shall, as long as he has an eligible dependent child, be reduced by an amount prescribed under regulations of the Secretary of Defense.

(c) The retired or retainer pay of a person who has elected to provide an annuity to a person designated by him under section 1450(a) (3) of this title shall be reduced by 10 percent plus 5 percent for each full 5 years the individual designated is younger than that person. However, the total reduction may not exceed 40 percent.

(d) If a person who has elected to participate in the Plan has been awarded retired or retainer pay and is not entitled to that pay for any period, he must deposit in the Treasury the amount that would otherwise have been deducted from his pay for that period, except when he is called or ordered to active duty for a period of more than 30 days.

(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

(f) Except as provided in section 1450(e) of this title, a person is not entitled to any refunds of amounts deducted from retired or retainer pay under this section unless the amounts were deducted through administrative error.

Added Pub.L. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 710.

Legislative History. For legislative 1972 U.S.Code Cong. and Adm.News, p. history and purpose of Pub. L. 92-425, see—.

§ 1453. *Recovery of annuity erroneously paid . . .*

§ 1454. *Correction of administrative deficiences . . .*

§ 1455. *Regulations*

The President shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the armed forces, the Na-

tional Oceanic and Atmospheric Administration, and the Public Health Service. Those regulations shall—

(1) provide that, when the notification referred to in section 1448(a) of this title is required, the member and his spouse shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available and the effects of such elections; and

(2) establish procedures for depositing the amounts referred to in section 1452(d) of this title.

Added Pub.L. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 711.

Legislative History. For legislative history and purpose of Pub. L. 92-425, see 1972 U.S.Code Cong. and Adm.News, p. —.

10 U.S.C.A. § 2771. *Final settlement of accounts: deceased members*

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

38 U.S.C.A. § 3105. *Waiver of retired pay*

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if he were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

As amended Pub.L. 91-621, § 6(a)(3), Dec. 31, 1970, 84 Stat. 1864.

1970 Amendment. Pub.L. 91-621 substituted "National Oceanic and Atmospheric Administration" for "Coast and Geodetic Survey".

Legislative History. For legislative history and purpose of Pub.L. 91-621, see 1970 U.S.Code Cong. and Adm.News, p. 5757.

10 U.S.C.A. § 6323

"(a) An officer of the Navy or Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

"(b) For the purposes of this section (1) an officer's years of active service are computed by adding all his active service in the armed forces; and (2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent or temporary appointments in grades above warrant officer, W-1.

"(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired (1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or (2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade. . . .

"(e) Unless otherwise entitled to a higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay to

which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based. . . ."

United States Constitution, Article VI, Clause 2.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything on the Constitution or the laws of any State to the contrary notwithstanding."

State Statutes.

California Probate Code, § 201

§ 201. *Title of surviving spouse; portion subject to testamentary disposition or succession*

Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code. (Stats. 1931, c. 281, p. 595, § 201, as amended Stats. 1935, c. 831, p. 2249, § 2.)

California Civil Code § 4800

(a) Time of division; equality.

(a) Except upon the written agreement of the parties, or an oral stipulation of the parties in open court, the court shall in its interlocutory judgment of dissolution of marriage . . . divide the community property and the quasi community property of the parties . . . equally.

California Civil Code § 5119

After the rendition of a judgment decreeing legal separation of the parties, the earnings or accumulations of each party are the separate property of the party acquiring such earnings or accumulations.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1387

In re the Marriage of
JAMES E. FITHIAN, JR.,

Petitioner,

and

CAMILLE J. FITHIAN,

Respondent.

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court, State of California is reported in at 10 Cal. 3d 592; 11 Cal. Rptr. 369.

JURISDICTION

The opinion of the California Supreme Court was made and entered on January 3, 1974. Petitioner James E. Fithian, Jr. filed his Petition for Certiorari within ninety (90) days of that date. Petitioner seeks to invoke the jurisdiction of this court under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether California's treatment of military retirement pay as a community asset conflicts with the federal statutes under which petitioner was retired.

STATEMENT OF THE CASE

The marriage of appellant and respondent was dissolved and an adjudication of the community property of the marriage made by the trial court. One of the assets of the community divided by the Court was the retirement pay attributable to appellant's service in the United States Marine Corps. Appellant was found to have served a total of 22 plus years and to have been married to respondent for 71% of his total active duty years. He had retired in 1969, two years before the filing of a petition for dissolution.

The trial court held, and the Fourth District Court of Appeal, along with the California Supreme Court affirmed that 71% of the retirement pay was community property and awarded 35-1/2% or one-half, of said pay to respondent wife.

ARGUMENT

I
CERTIORARI SHOULD NOT BE GRANTED WHERE NO FEDERAL QUESTION OF SUBSTANCE HAS BEEN DECIDED BY THE STATE COURT.

Rule 19 of the Supreme Court Rules sets forth criteria which must be met before certiorari is granted.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of

substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court."

As more fully set forth below, the California Supreme Court after studying applicable Senate reports, Congressional hearings, and the statutes cited by appellant decided that California's treatment of military retirement pay as an asset of community property does not conflict with the federal statutes under which petitioner was retired. Respondent submits that where applicable federal statutes are silent with regards to state characterization of military retirement pay as community, and both state and federal statutes can exist harmoniously, no federal question of substance is presented.

"We have studied Senate reports and Congressional hearings concerned with the adoption of the federal military retirement pay system in an effort to ascertain any legislative intent to preserve the benefits of the system as the separate property of the recipient. We fail to find in the legislative background any indication that Congress intended military retirement pay to be separate property, or conversely, that treating the pay as community property circumvents the Congressional scheme."

Fithian and Fithian,
10 Cal. 3d 592, 111 Cal. Rptr. 369.

II

IN THE ABSENCE OF A CLEAR CONFLICT BETWEEN CALIFORNIA'S TREATMENT OF MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY AND THE PROVISIONS OF TITLE 10 U.S.C., NO FEDERAL QUESTION IS PRESENTED AND CERTIORARI SHOULD BE DENIED.

Where Congress has enacted legislation within its Constitutional authority the courts will try to interpret such legislation in consonance with state law and avoid superseding or overcoming the effects of state law.

Having "due regard for a proper adjustment of the local and national interests in our federal scheme . . . the courts should discountenance 'inroads by implication' on state authority."

Hartford Electric Light Co. v. Federal Power Commission,
131 F. 2d 953 (2d Cir. 1942);

Palmer v. Massachusetts,
308 U.S. 79, 60 S. Ct. 34 (1939);

Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 61 S.Ct. 349 (1940).

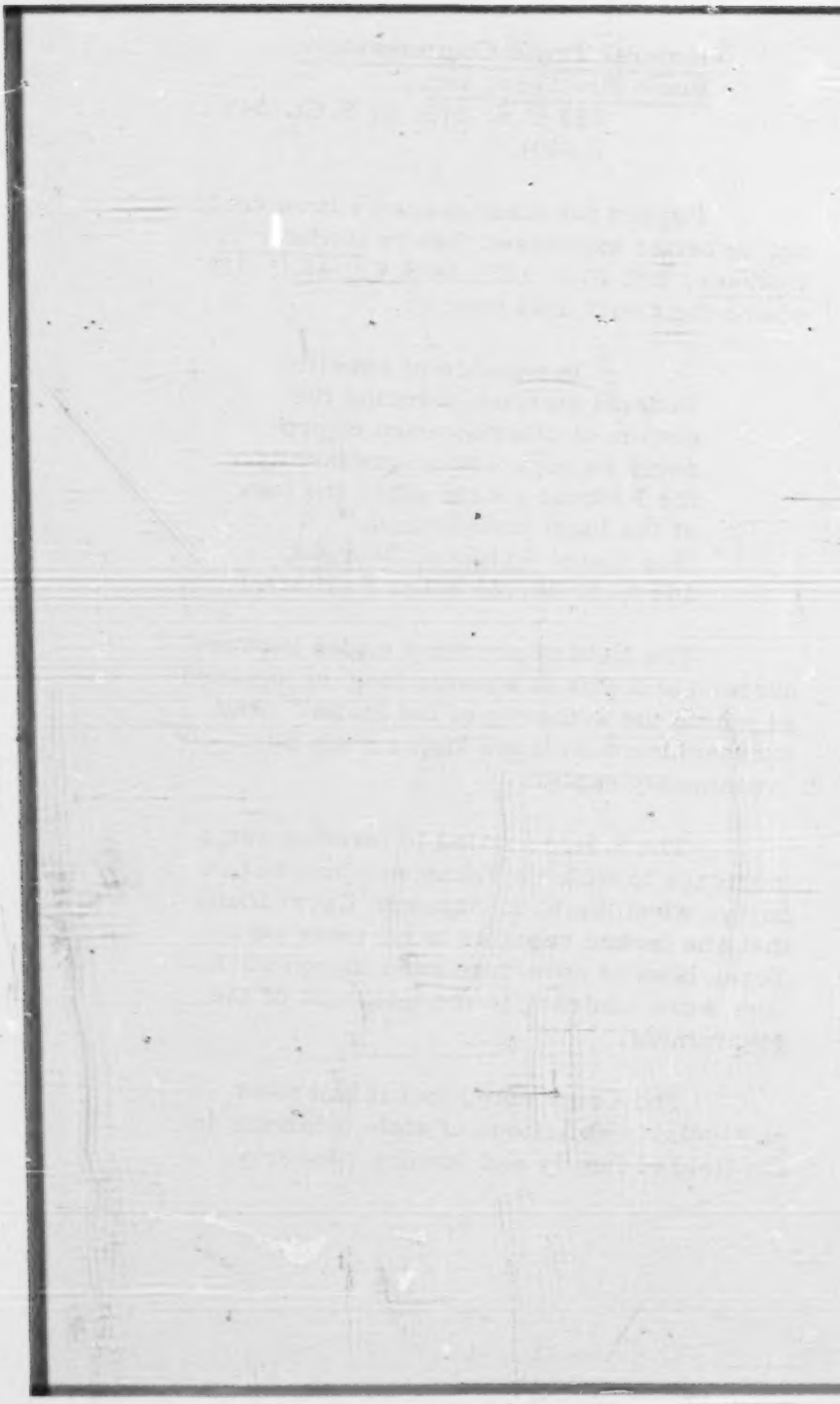
Regard for state property laws could not be better expressed than in Buchser v. Buchser, 231 U.S. 157, 34 S.Ct. 46 (1913) where the Court held that:

> "In absence of specific Federal statutes covering the matter of classification of property as separate or community, the Federal courts apply the laws of the local jurisdiction."
> (See also: Wright v. Morgan, 191 U.S. 55, 24 S.Ct. 6 (1903).)

The field of property rights between husband and wife is an area long recognized as within the authority of the State. Any encroachment on those rights must be "reasonably explicit."

The S.B.A. failed to foreclose on a mortgage to which a Texas wife had been a party, when the U.S. Supreme Court found that she lacked capacity to contract under Texas laws of coverture even though such laws were contrary to the interests of the government.

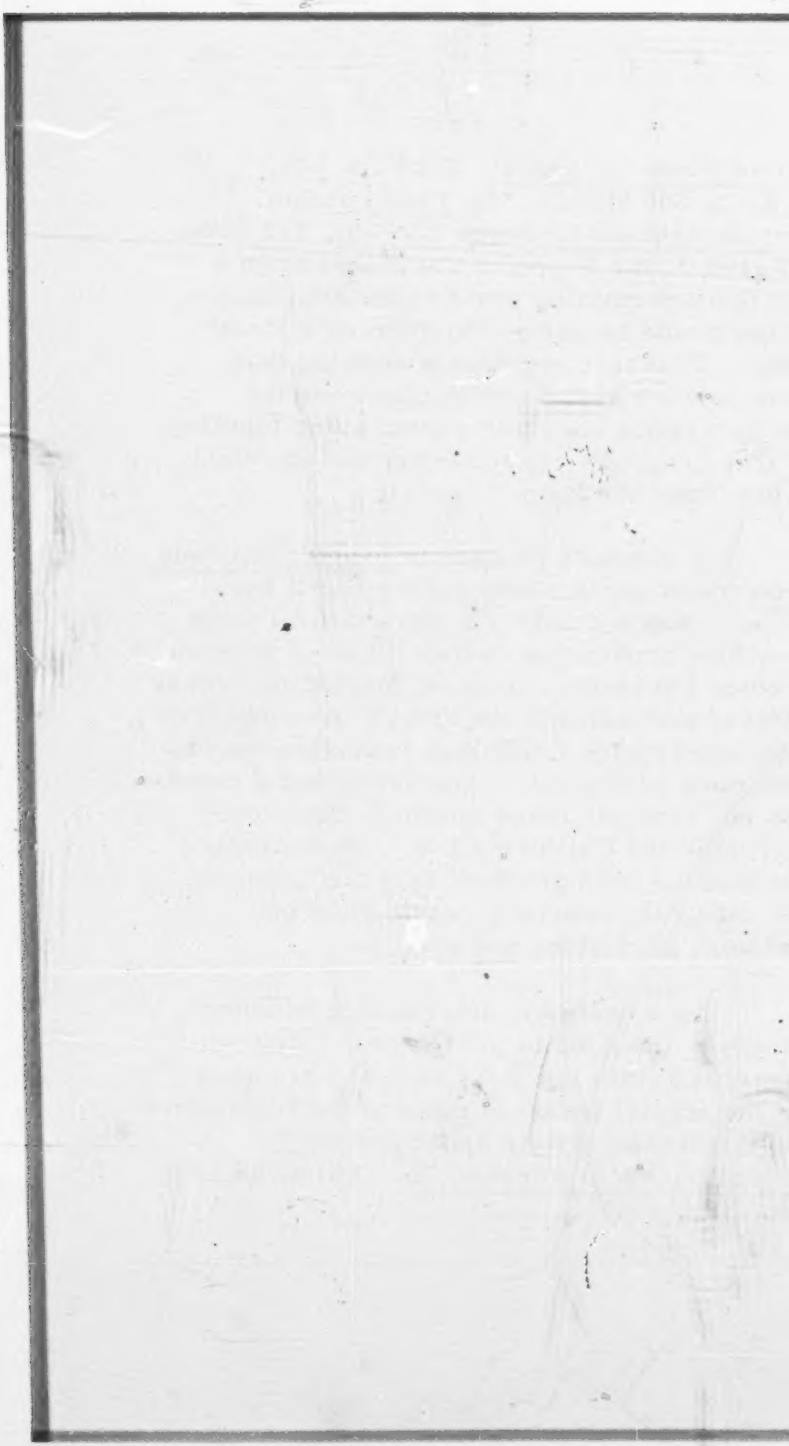
The Court noted that it had been particularly solicitous of state interests in the field of family and familiy property.



United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500 (1956). In Yazell and in Florida Avocado Growers v. Paul, 373 U.S. 132 (1963), the Supreme Court laid down a test for determining whether the supremacy clause would be applied to overcome state laws. That test requires a showing that there is such actual conflict between the two provisions that both cannot stand together or that Congress explicitly showed an intent to pre-empt the field.

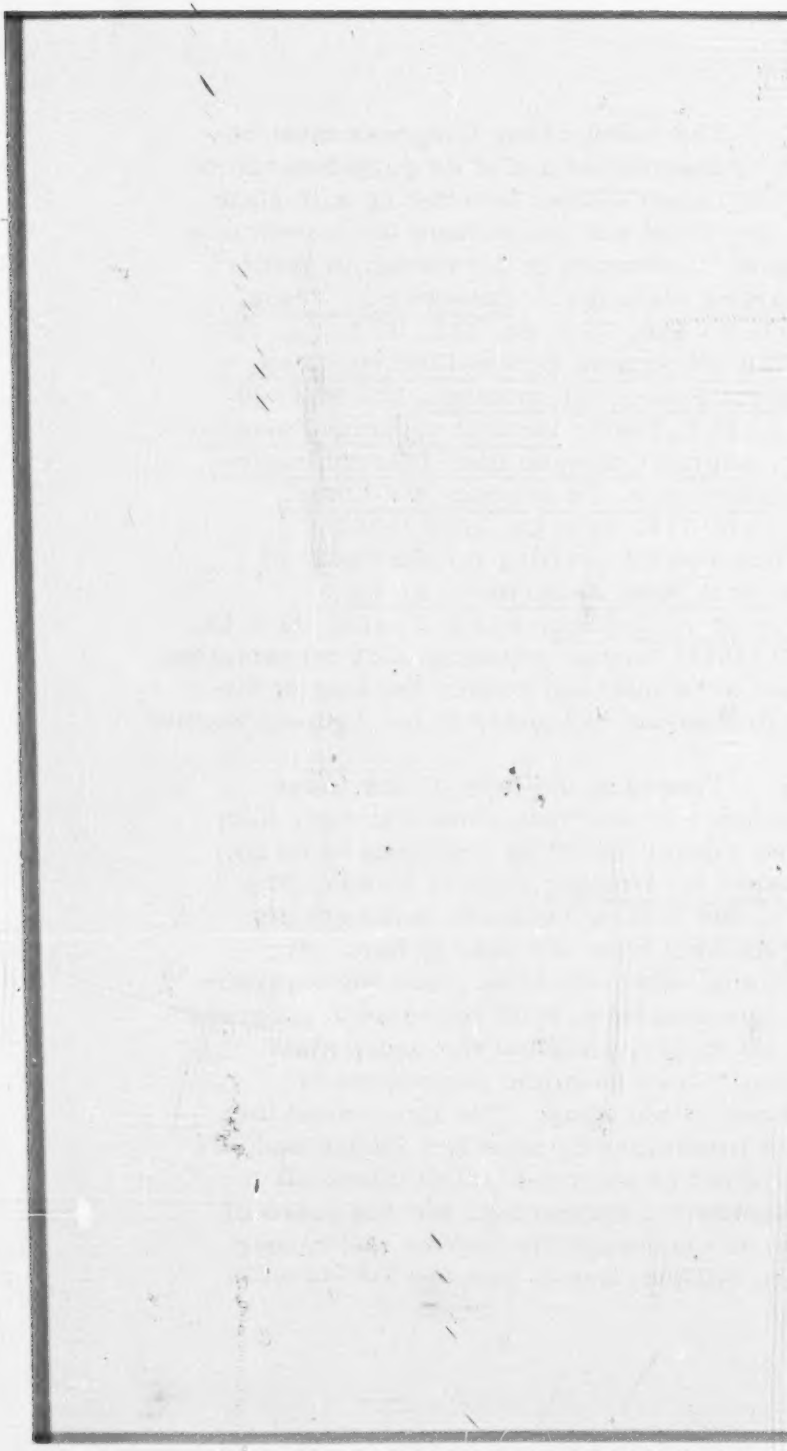
A comparison used in Florida Avocado Growers is particularly instructional here. At issue was a California Agricultural Code provision prohibiting certain types of avocadoes to enter the state. Federal marketing orders differed and under those orders the avocadoes restricted by the California provision would have been permitted. The Court found there was no "irreconcilable conflict" that would overcome the California law. It contrasted this conflict with one involving the Tobacco Act noting the contrary result when the statutory provisions are specific.

As a basis for determining whether Congress intended to pre-empt the field or supersede state law the Court will not seek out the mental frame of mind of the legislators but will let the statute speak for itself. Kendall v. Keith Furnace Co., 162 F.2d 1002 (8th Cir., 1947).



The intent of the Congress must be clearly manifested and if its purposes can be accomplished without interfering with state law the Court will not impose the supremacy clause. Inference is not enough to justify thwarting state law. Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952); First Iowa Hydro-Electric Coop. v. Federal Power Commission, 151 F.2d 20 (C.A. D.C.1945); Kendall v. Keith Furnace Co., supra; Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 83 S.Ct. 1022 (1963). Justice Powell writing for the Court in New York State Department of Social Services v. Dublino, 415 U.S. 405, 93 S.Ct. 2507 (1973) further explained that pre-emption is not to be inferred merely because of the comprehensive character of the Federal Statute.

Viewed in the light of this clear reluctance to override state law other than under explicit intent by Congress to do so, Wissner v. Wissner, 338 U.S. 655, 70 S.Ct. 398 (1949), becomes obviously distinguishable from the case at bar. By providing comprehensive plans for compensating servicemen upon retirement, Congress did not display an intent to usurp state property laws as to the disposition or interest in such pay. The intent read into these provisions by appellant cannot and should not be inferred. The intent to compensate a serviceman for his years of duty, to encourage his morale and career in the military and to provide for his well-



being in later life are in no way inconsistent with community property law or does division upon dissolution frustrate the purpose of these intents.

III

THE SURVIVOR BENEFIT PLAN, TO WHICH PETITIONER HAD THE OPTION OF SUBSCRIBING, IS NOT INCONSISTENT WITH CALIFORNIA'S TREATMENT OF MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY.

Petitioner argues that Title 10 Sections 1447 through 1455 and 10 U.S.C.A. Section 2771 evidence a congressional intent to preclude the states from dividing military retirement pay at the time of a dissolution of marriage.

The Survivor Benefit Plan basically allows a retired member of the armed forces to accept a reduced rate of retirement pay in exchange for a subscription to an annuity plan which provides for his beneficiaries upon his death. It must be noted however, that the California Supreme Court in its decision in the instant case specifically precluded the ex-spouse from sharing in petitioner's military retirement pay upon petitioner's death. Consequently, it cannot be said that the ex-spouse is treated better than the serviceman's widow who is entitled to an annuity under the Survivor Benefit

Plan. While it is true the latter's rights terminate upon remarriage, California would not grant the divorced wife any rights in said fund once the serviceman died.

Petitioner further argues that Title 10 U.S.C.A. Section 2771 in its provision for the settlement of accounts of deceased members of the armed service evidences a congressional intent that all military compensation is the separate property of the serviceman husband. To the contrary, said statute merely allows the serviceman to designate a beneficiary to receive any residual monies which are due but unpaid at his death. Unlike the situation facing the court in Wissner where the right to choose a beneficiary was an integral and explicit part of the federal plan, here the serviceman's designation right constitutes no more than a contingency procedure to distribute whatever money, if any, is due to the serviceman for which he failed to collect. No congressional intent that the designation right is essential to the entire military retirement pay system, or that it forecloses the states from classifying the retirement benefits as community property exists.

IV

THE CASE OF WISSNER V. WISSNER RELIED UPON BY PETITIONER IS DISTINGUISHABLE FROM THE INSTANT CASE AND PRESENTS NO AUTHORITY FOR THE PROPOSITION THAT CONGRESS INTENDED MILITARY RETIREMENT PAY TO BE THE SEPARATE PROPERTY OF THE SERVICEMAN.

Scrutinized under the many Supreme Court pronouncements of the applicability of the supremacy clause it becomes readily apparent how the Court arrived at its decision in Wissner v. Wissner, 338 U.S. 655, 70 S. Ct. 398 (1949). Congress had specifically provided under the National Service Life Insurance Act for the ability of the serviceman to designate a beneficiary and such designation could be of a person other than his wife -- a designation in direct conflict with the California laws on community property. In such a case it is clear that there is a conflict, that the supremacy clause is set in operation, and that the state law is superceded. The Court did not ruminate over possible Congressional intent. It addressed itself to the actual provisions of the statute and found that "Congress has spoken with force and clarity: and that to hold otherwise would frustrate the 'deliberate purpose of Congress.'" (At pp. 658, 659.)

Petitioner however has tortured from Wissner a vacuous test for establishing when military payments or benefits may be determined to be separate property. Nowhere in the decision does the court discuss separate property. It makes no determination whether the proceeds of the insurance policy are the serviceman's separate property. It only determines that Congress had legitimately acted within its Constitutional authority and to the extent community property law was thwarted, the Congressional enactment was overriding. The Court did not nor did it have to decide whether the policy was separate property and certainly set up no test which could be applied to determine whether other military payments could be so characterized.

In addition, all of the characteristics or components of this test may also be attributed to active duty military pay. Certainly active duty pay is paid from Congressional appropriations, is non-contributory and the costs of its administration is borne by the United States. It is paid and frequently increased to raise the level of morale of the serviceman and to provide him material protection. Yet it is well-recognized that such pay to the extent earned during marriage in a community property jurisdiction is community property. Savings, investments or property attributed to it during the course of marriage would be subject to disposition on termination of the marriage.

Unlike the provisions of the National Service Life Insurance Act, the sections of Title 10 pertaining to military retirement pay are not explicit in creating a right or interest that conflicts with a wife's community property interest. They are like any other retirement system explicit only in the method of computation and terms of entitlement. They are compatible with the property laws of the various states.

Where both military retirement pay statutes and California's community property law can exist in harmony, California is free to act and the supremacy clause does not come into play.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue for review of the opinion of the California Supreme Court.

Respectfully submitted,

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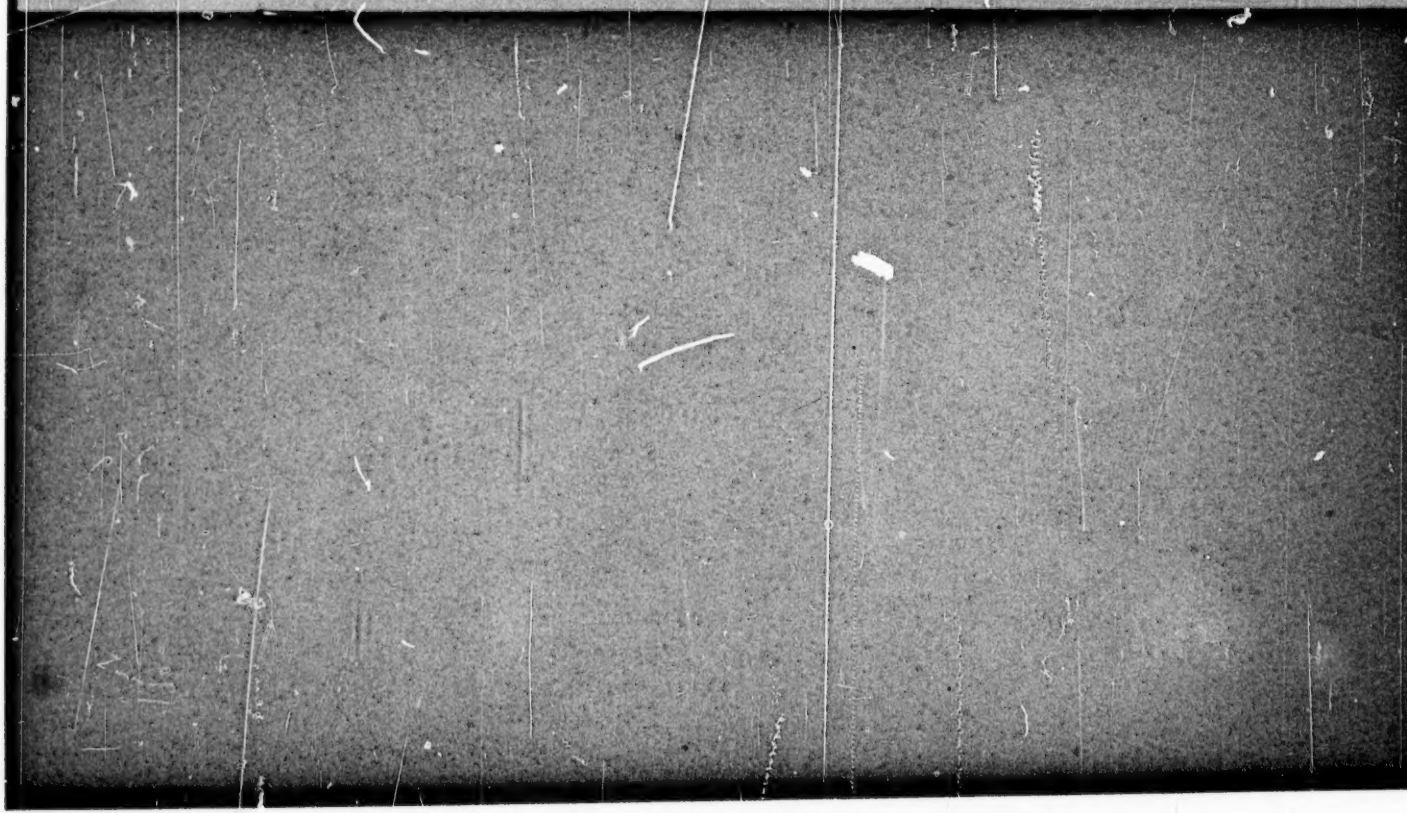

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MICHAEL RODAK, JR.

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and

CAMILLE J. FITHIAN,
Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

By Denying Petitioner's Writ of Certiorari the Court Is in Direct Conflict With Its Decision in United States v. Tyler, 105 U.S. 244.

As indicated in the original Petition for Writ of Certiorari, the applicable rule in California is that active duty military pay, as with any pay received for employment, is not subject to distribution in a *dissolution proceeding*. (California Civil Code, Section 5119.)

Petitioner contends that Federal military retirement pay is active duty pay at a reduced rate, thus not within the jurisdiction of the California Courts in a dissolution proceeding. This contention is supported by the United States Supreme Court case of *United States v. Tyler*, 105 U.S. 244.

The issue presented in *Tyler*, is the same as that in the present petition: Whether money received by a military officer by way of military retirement is a form of active duty pay.

The Court held that retired officers continued to be a part of the military forces of this country. The *Tyler* case states:

> "The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit."

The Court went on to state:

> "It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.
>
> If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States."

It concluded:

> "We are of opinion that retired officers are in the military service of the government . . ."

In denying Petitioner's Writ of Certiorari, the Court has placed itself in direct opposition to its holding in

United States v. Tyler, supra, without actually overruling it.

Petitioner contends Federal military pay is not subject to characterization by the California Court as compensation solely for past services. By denying Certiorari, the Court is allowing the California Supreme Court to make Federal military pay as compensation for past services, a Federal question, inconsistent with the decision in *Tyler.* It is, therefore, respectfully submitted that the Court hear the present petition and either affirm or overrule its holding in *United States v. Tyler, supra.*

Conclusion.

For the foregoing reasons a Petition for Rehearing should issue to review the opinion of the Supreme Court of California in this action.

STEVEN E. BRIGGS,
Attorney for Petitioner.

LAWTON, CHRISTENSEN, FAZIO, MCDONNELL,
BRIGGS, WARD & DESALES,
Of Counsel.

I, Steven E. Briggs, attorney for Petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

STEVEN E. BRIGGS,

Attorney for Petitioner.